In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-544

JOHN D. MCGREGOR AND
ROBERT FLETCHER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the district court should have transferred their case to a more convenient district.

After a jury trial in the United States District Court for the District of Minnesota, petitioners and Fountain Agency Inc. were convicted on all 26 counts of an indictment, returned in Minnesota, charging them with using the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341. Each petitioner was sentenced to a term of three years' probation and fined $1,000. The court of appeals affirmed (Pet. App.).

1. The facts are set out in the opinion of the court of appeals. In 1960 petitioners and a third party established Fountain Agency Inc., an insurance agency incorporated in Louisiana (Tr. III, 61).[1] Fountain operated as the agent

[1] "Tr." refers to the four-volume transcript of the trial.

of insurance companies; it contracted with them and sold their policies (Tr. III, 61-62). During the period covered by the indictment Fountain sold primarily automobile insurance, generally on vehicles newly purchased by high-risk drivers (Tr. I, 31-32, 49). The insurance policies often were written by the auto dealer himself, acting as Fountain's subagent; the insurance, together with the purchase price of the auto, was financed through companies such as General Motors Acceptance Corporation (Tr. I, 30-31, 65-69, 72-73).

One of the firms Fountain dealt with was Northland Insurance Company,[2] an insurance underwriter licensed and operating in Minnesota. Fountain had negotiated with Northland, as with most of the other companies it represented, "retrospective" agreements. Under the terms of the "retrospective" contract Fountain "earned" 80 percent of the premium it collected, and Northland retained 20 percent. The total premium, however, was forwarded to Northland, which would credit the "earned" 80 percent to Fountain's account. This account was used as a fund out of which all claims by Fountain's insureds were paid. After claims adjustment, if the losses did not exceed the agent's premium pool, Northland would refund a pro rata amount of the premiums to Fountain (Tr. I, 24-27).

The retrospective contracts Fountain entered into with Northland and the other insurance companies added to cash flow problems already suffered by Fountain; the "earnings" under the Northland policies were unavailable until long after the premiums had been paid. Not only did

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[2]Fountain also dealt with Coastal Casualty Co., a subsidiary of Northland; policies bearing both names are involved in the indictment. However, for purposes of clarity we refer throughout only to Northland.

Fountain experience a need for revenues to pay operating expenses, but it also had negotiated collateral contracts with its salesmen or subagents who sold its policies, under which the subagent retained 20% of the premium as a commission. Fountain thus committed 120% of the premium at the outset; 80% to its account at Northland, 20% to Northland itself, and 20% to salesmen.

After Fountain realized that expanding its business under retrospective contracts simply committed it to pay additional commissions, without rectifying the cash flow problems, petitioner McGregor decided to undertake a program of cancelling policies with Northland, without notifying or forwarding refunds to the insureds (Tr. III, 70-71, 104-105). Under the plan notices of cancellation were prepared on selected policies and sent to Northland along with false proof that notices of cancellation had been sent to the policy holder and lienholder. Northland then refunded to Fountain the pro-rated unearned portion of the premium on the cancelled policy. However, because they had not been notified of the "cancellation," the policy holders and lienors still could hold Northland liable on the policy.[3]

During the periods of cancellation Fountain paid claims against the cancelled policies out of the refunded premiums. None of the cancelled premiums was refunded to the policy holders. When delays began to develop in Fountain's ability to pay claims against the cancelled policies and complaints were directed to Northland, the plan came to light.

2. Petitioners contend that the district court erred in denying their motion pursuant to Fed. R. Crim. P. 21(b) to transfer the case to the Middle District of Louisiana,

[3]The indictment alleged that the defendants, acting as agents for Northland Insurance Company, a licensed insurance company in Minnesota, caused notification of insurance policy cancellations to be sent to Northland for the purpose of fraudulently obtaining premium refunds from Northland.

where they resided. Petitioners argue (Pet. 7) that the decision not to transfer also conflicts with the letter and spirit of the venue provisions of the Constitution, Article III, Section 2, and Amendment VI.

As petitioners concede (Pet. 6), the prosecution was properly brought in Minnesota, the district into which the fraudulent mailings were made and in which Northland is located. 18 U.S.C. 3237(a); *Salinger* v. *Loisel*, 265 U.S. 224, 233-234. We submit that the court of appeals properly applied the standards of *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243-244, in deciding that neither the Constitution nor Rule 21(b) compelled the district court to grant petitioners' transfer motion.[4] The court below stated (Pet. App. A-7 to A-8):

> To determine whether the appellants were entitled to a transfer from the district for trial, the factors announced in *Platt* come into play. Here the party defrauded was an insurance company based in Minnesota. The chief government witness was the vice president of Northland. Other Northland witnesses and the postal inspectors involved were from Minnesota. Most of the documents entered into evidence during the trial came from Northland's office. These factors buttress the trial court's denial of the motion for transfer. The appellants have failed to demonstrate, as required by *United States* v. *Phillips, supra,* 433 F.2d at 1368, that some substantial right has actually been affected. The motion was properly denied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[4]Any inconvenience in transporting witnesses from Louisiana to Minnesota was borne by the government. Sixteen of the government's witnesses resided in Louisiana, one in Oklahoma, and five in Minnesota. Only petitioner McGregor testified for the defense.